

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Case No. 2:13-cr-00334-JCM-CWH-1

Plaintiff-Appellee,

ORDER

V.

ANTON PAUL DRAGO, AKA Evan
Joseph Fogarty,

Defendant-Appellant.

13

14 Presently before the court is Anton Paul Drago's ("defendant") motion for
15 recusal/disqualification of judge. (ECF No. 220).

16 Also before the court is defendant's motion for leave to file interlocutory appeal. (ECF
17 No. 222). The United States of America ("the government") filed a response (ECF No. 223), to
18 which defendant did not reply.

19 Also before the court is nonparty Louis Early, Jr.'s notice regarding shutdown, filed on
20 defendant's behalf. (ECF No. 224).

21 Also before the court is attorney Rebecca Levy's unopposed motion to stay order. (ECF
22 No. 225).

23 | I. Background

24 Defendant moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255,
25 alleging ineffective assistance of trial counsel. (ECF No. 211). Defendant avers that trial counsel
26 was ineffective by “not knowing the strength of the government’s case, resultantly being wholly
27 unprepared for trial, and in not entering into plea negotiations with the government, or otherwise
28 exploring ramifications and advisability of direct pleas of guilty.” *Id.* at 13–14. Defendant argues

1 that, had his trial counsel been effective, he would have “admitted [his] guilt, foregone trial, and
 2 would have received a lower sentence than that which [was] obtained.” *Id.* at 14.

3 In light of these arguments, the government filed a motion for an order deeming the
 4 attorney-client privilege waived, which the court granted. (ECF Nos. 213; 215). Admittedly, the
 5 court did so prematurely and without allowing defendant an opportunity to respond. The
 6 government then moved to clarify whether the court’s order applied to Ms. Levy, defendant’s prior
 7 counsel, in light of defendant’s arguments in support of his motion. (*See generally* ECF No. 216).
 8 The court granted that motion and held that defendant’s attorney-client privilege with Ms. Levy
 9 was also waived. (ECF No. 217). Admittedly, the court did so prematurely and without allowing
 10 defendant an opportunity to respond.

11 Defendant objected to the government’s motions and this court’s orders. (ECF No. 218).
 12 Defendant argues that his § 2255 claim pertains only to his trial counsel’s alleged ineffectiveness,
 13 not Ms. Levy’s. *Id.* Defendant also argues that the court’s premature grant of both motions evinces
 14 bias that requires recusal and justifies an interlocutory appeal. (ECF Nos. 220; 222).

15 **II. Legal Standard**

16 “A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however
 17 inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by
 18 lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citation
 19 omitted). To that end, federal courts will sometimes ignore the legal label that a *pro se* litigant
 20 attaches to a motion and recharacterize the motion in order to place it within a different legal
 21 category. *See, e.g., Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000); *United States v.*
 22 *Detrich*, 940 F.2d 37, 38 (2nd Cir. 1991); *United States v. Miller*, 197 F.3d 644, 648 (3rd Cir.
 23 1999); *Raines v. United States*, 423 F.2d 526, 528, n. 1 (4th Cir. 1970); *United States v. Santora*,
 24 711 F.2d 41, 42 (5th Cir. 1983); *United States v. McDowell*, 305 F.2d 12, 14 (6th Cir. 1962);
 25 *Henderson v. United States*, 264 F.3d 709, 711 (7th Cir. 2001); *McIntyre v. United States*, 508
 26 F.2d 403, n. 1 (8th Cir. 1975) (*per curiam*); *United States v. Eatinger*, 902 F.2d 1383, 1385 (9th
 27 Cir. 1990) (*per curiam*); *United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000); *United*
 28 *States v. Jordan*, 915 F.2d 622, 625 (11th Cir. 1990); *United States v. Tindle*, 522 F.2d 689, 693

1 (D.C. Cir. 1975) (*per curiam*).

2 The court construes defendant's motion as (1) a motion for reconsideration and (2) a
 3 motion for a certificate of appealability.

4 *a. Reconsideration*

5 Although Federal Rules of Criminal Procedure do not expressly authorize the filing of
 6 motions for reconsideration, a "postjudgment motion for reconsideration may be filed in a criminal
 7 case and governed by Fed. R. Civ. P. 59(e)." *United States v. Martin*, 226 F.3d 1042, 1047 n.7
 8 (9th Cir. 2000); *see also United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003) ("As noted by
 9 the Second and Ninth Circuits, motions for reconsideration may be filed in criminal cases.").

10 A motion for reconsideration "should not be granted, absent highly unusual
 11 circumstances." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880
 12 (9th Cir. 2009). "Reconsideration is appropriate if the district court (1) is presented with newly
 13 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3)
 14 if there is an intervening change in controlling law." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d
 15 1255, 1263 (9th Cir. 1993); *see* Fed. R. Civ. P. 60(b).

16 Rule 59 "permits a district court to reconsider and amend a previous order." *Carroll v.*
 17 *Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (internal quotations omitted). However "the rule
 18 offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of
 19 judicial resources." *Id.* A motion for reconsideration is also an improper vehicle "to raise
 20 arguments or present evidence for the first time when they could reasonably have been raised
 21 earlier in litigation." *Marlyn Nutraceuticals*, 571 F.3d at 880.

22 *b. Certificate of appealability*

23 The controlling statute in determining whether to issue a certificate of appealability is 28
 24 U.S.C. § 2253, which provides in pertinent part as follows:

25 (a) In a habeas corpus proceeding or a proceeding under section
 26 2255 before a district judge, the final order shall be subject to
 27 review, on appeal, by the court of appeals for the circuit in which
 28 the proceeding is held.

...
 28

1
2 (c)
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4 (1) Unless a circuit justice or judge issues a certificate of
appealability, an appeal may not be taken to the court of appeals
from—

5 (A) the final order in a habeas corpus proceeding in which
6 the detention complained of arises out of process issued by
a State court; or

7 (B) the final order in a proceeding under section 2255.

8 (2) A certificate of appealability may issue under paragraph (1) only
9 if the applicant has made a substantial showing of the denial of a
constitutional right.

10 (3) The certificate of appealability under paragraph (1) shall indicate
11 which specific issue or issues satisfy the showing required by
paragraph (2).

12 28 U.S.C. § 2253.

13 Under § 2253, the court may issue a certificate of appealability only when a movant makes
14 a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a
15 substantial showing, the movant must establish that “reasonable jurists could debate whether (or,
16 for that matter, agree that) the petition should have been resolved in a different manner or that the
17 issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v.*
18 *McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

19 **III. Discussion**

20 To the extent the motion functions as one for reconsideration, the court grants the motion.
21 The court erred by granting both motions without allowing defendant an opportunity to respond.
22 However, defendant has objected to this court’s orders, and the court now considers his arguments.

23 Defendant argues that the attorney-client privilege as to Ms. Levy cannot and should not
24 be waived because his § 2255 motion does not allege that she was ineffective. (ECF No. 218 at
25 3). Thus, by defendant’s estimation, the government’s request amounts to nothing more than “a
26 mere fishing expedition.” *Id.*

27 In support of his argument, defendant cites to *Duran v. United States*, No. 17CR1833-
28 CAB, 2019 WL 1755721 (S.D. Cal. Apr. 19, 2019), and *United States v. Guntipally*, 16-CR-00189-

1 LHK-2, 2019 U.S. Dist. LEXIS 141432 (N.D. Cal. Aug. 19, 2019).¹ In both *Duran* and *Guntipally*,
 2 the defendant moved to vacate his sentence pursuant to § 2255, alleging ineffective assistance of
 3 counsel. *See generally Duran*, 2019 WL 1755721; *Guntipally*, 2019 U.S. Dist. LEXIS 141432.
 4 In both cases, the court waived the attorney-client privilege. *Id.* In neither case did the court
 5 indicate that a defendant may preserve the attorney-client privilege as to one attorney by not
 6 challenging her effectiveness while simultaneously alleging ineffectiveness of trial counsel,
 7 particularly when the conduct of the first attorney may influence the determination of whether trial
 8 counsel was, in fact, ineffective. *Id.*

9 To prevail on his ineffective assistance of counsel claim, “[t]he defendant must show that
 10 there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the
 11 proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In
 12 this case, as in *Lafler v. Cooper*, the second prong of *Strickland* means “defendant must show that
 13 but for the ineffective advice of counsel there is a reasonable probability that the plea offer would
 14 have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the
 15 prosecution would not have withdrawn it in light of intervening circumstances)” *Lafler v.*
 16 *Cooper*, 566 U.S. 156, 164 (2012).

17 In support of its motion to deem the attorney-client privilege waived, the government
 18 represented as follows:

19 In preparation for the government’s response to Drago’s motion,
 20 counsel for the United States identified correspondence from June
 21 2015 between Drago’s then-attorney, Assistant Federal Public
 22 Defender Rebecca Levy, and counsel for the United States. That
 23 correspondence shows that the government made a pretrial plea
 24 offer to Mr. Drago on June 6, 2015, and that the parties negotiated a
 25 potential resolution for several weeks.

26 (ECF No. 216 at 2). And, in opposition to the instant motion for an interlocutory appeal, the
 27 government further represented that:

28 Not only did Drago fail to accept the plea offer that was extended to
 29 him, but the record before the Court strongly suggests that Drago
 30 did not follow AFPD Levy’s advice. During a pretrial hearing,

¹ Defendant erroneously cites both of these cases as Ninth Circuit authority. (See ECF No. 218 at 3). The court notes that they are district court cases.

1 Drago's attorney described his client's desire to proceed to trial:
 2 "Mr. Drago tells me that, you know, the Federal Defender was
 urging him to enter a plea of guilty, and he doesn't feel he's guilty."

3 (ECF No. 223 at 5 (citing ECF Nos. 132 at 7; 153 at 88–89)).

4 Whether the government offered defendant a plea agreement while Ms. Levy was
 5 defendant's attorney admittedly does not affect whether trial counsel was ineffective. However,
 6 the extent to which Ms. Levy apprised defendant of the strength of the government's case and
 7 explored the ramifications and advisability of pleading guilty does impact whether the result of the
 8 proceeding would have been different. For instance, Ms. Levy may have told defendant in no
 9 uncertain terms that he had virtually no chance of success at trial and, as a result, defendant sought
 10 trial counsel who would take his case before a jury. If that is the case, it would certainly be material
 11 to the court's analysis regarding whether defendant would have, as he now contends, pleaded
 12 guilty if his trial counsel was competent.

13 ““The privilege which protects attorney-client communications may not be used both as a
 14 sword and a shield.”” *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (quoting *United*
 15 *States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997)) (alteration omitted). By arguing that his trial
 16 counsel was ineffective but asserting attorney-client privilege as to Ms. Levy, defendant would
 17 use the privilege as both a sword and a shield. The court will not countenance this tactic.
 18 Accordingly, the court finds that defendant has implicitly waived the attorney-client as to Ms.
 19 Levy by raising the instant ineffective assistance of counsel claim.

20 To the extent defendant's motion functions as one for a certificate of appealability, the
 21 court denies the motion. the court finds that defendant has not made the required substantial
 22 showing of the denial of a constitutional right to justify the issuance of a certificate of appealability.
 23 The orders that defendant takes umbrage with are not final, appealable orders. And, in light of the
 24 foregoing, reasonable jurists would not find the court's determination regarding the waiver of
 25 attorney-client privilege as to Ms. Levy debatable, wrong, or deserving of encouragement to
 26 proceed further.

27 Because the court has address defendant's motion for an interlocutory appeal, Ms. Levy's
 28 motion to stay order (ECF No. 225) is denied as moot. In response to COVID-19, Terre Haute

1 FCI, where defendant is currently incarcerated, is in lockdown, which inhibits ability to participate
2 in this case. (ECF No. 224). Thus, the court will stay this action until June 30 and instructs the
3 government to file a status report on July 1. The court will set a new briefing schedule at that time.

4 **IV. Conclusion**

5 Accordingly,

6 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion for
7 recusal (ECF No. 220) be, and the same hereby is, DENIED.

8 IT IS FURTHER ORDERED that defendant's motion for leave to file interlocutory appeal
9 (ECF No. 222) be, and the same hereby is, GRANTED in part and DENIED in part. The court
10 denies the motion to the extent it seeks a stay and an interlocutory appeal. The court grants the
11 motion insofar as the court will not issue any further orders or decisions without allowing
12 defendant an opportunity to respond or reply and will not implicitly treat the government's motions
13 as ex parte.

14 IT IS FURTHER ORDERED that Ms. Levy's motion to stay order (ECF No. 225) be, and
15 the same hereby is, DENIED as moot.

16 IT IS FURTHER ORDERED that, in light of the COVID-19 pandemic and the attendant
17 closure of legal resources at Terre Haute FCI, the instant action is STAYED until June 30, 2020.

18 IT IS FURTHER ORDERED that the government shall file a status report on July 1, 2020.
19 The court will set a new briefing schedule thereafter.

20 DATED May 11, 2020.

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23 UNITED STATES DISTRICT JUDGE
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